1997

Anderson v. Doms : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

ELLEN ANDERSON, as Personal, Representative of the Estate of D.C. ANDERSON, DAN SCOTT, ELLEN ANDERSON, personally, and JEANNE SCOTT,	:	
Plaintiffs/Appellees and Cross-Appellants,	:	
vs.	:	
EUGENE E. DOMS AND MICHAEL R. MCCOY,	:	Case No. 970762-CA Priority No. 15
Defendant/Appellant and Cross-Appellee.	:	

REPLY BRIEF AND RESPONSE ON CROSS-APPEAL OF DEFENDANT/APPELLANT AND CROSS-APPELLEE

Appeal from a judgment, after remand, in the Third Judicial District Court, in and for Summit County, State of Utah, the Honorable John A. Rokich, Senior Judge, presiding.

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This is the second appeal of this case. In its prior opinion, this Court decided virtually all the issues raised by Plaintiffs in their responsive brief and brief on cross-appeal except the issue of prejudice as a prong of the doctrine of laches used by the lower court to prevent rescission. *See* Anderson, et al. v. Doms, et al., No. 920653CA (Utah App. Nov. 4, 1994)(Doms Op. Br., Add. 1). In that decision, the Court of Appeals specifically found the several challenges of Plaintiffs relating to the trial court's determination to allow Doms to proceed with his Counterclaim "to be without merit." *See* Add. 1 at p. 2. Thus, the Court of Appeals' opinion constitutes the "law of the case." *See* Thurston v. Box Elder Co., 892 P.2d 1034 (Utah 1995). Several arguments raised by Plaintiffs' cross-appeal and response to Doms' arguments in this appeal are therefore barred by the previous decision of this Court, and thus, become the "law of the case."

POINT I

PLAINTIFFS' RESPONSE TO DOMS' ARGUMENT THAT "THE TRIAL COURT ERRED BY CONCLUDING THAT PREJUDICE HAD BEEN ESTABLISHED" IS INSUFFICIENT TO SUPPORT THE LOWER COURT'S RULING.

Plaintiff begins its response by claiming that Doms has failed to marshal the evidence and, therefore, this Court should uphold the trial court's denial of rescission. However, Doms argues in response that there is literally no evidence to marshal. This Court found in its opinion in the first appeal of this case that:

> The trial court made findings concerning Doms' delay in bringing the action but made no findings as to whether Appellants were prejudiced by the delay. Therefore, we remand this case to the trial court for the purpose of entering findings of fact relevant to whether Appellants were prejudiced by any delays in Doms pursuing his Counterclaim.

No. 920653CA, p. 2, 3. (*See* Doms Op. Br., Add. 1, pp. 2, 3).

Doms argued in his opening brief that there was virtually no evidence to support the Court's findings, and, therefore, none can be marshalled (*see* Doms Op. Br. pp. 22, 23). Doms cited the case of Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991) for the proposition that "Appellant need not go through a futile marshalling exercise. Rather, Appellant can simply argue the legal insufficiency of the Court's findings as framed." The additional findings regarding prejudice in this case do not embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are grounded as required by the Woodward court. Plaintiffs merely suggest that Doms has failed to marshal the evidence but fail to make any citations to the record as to what evidence exists that Doms failed to marshal. Doms claims no evidence of prejudice (except decreased value) was ever presented or proffered in the lower court.

Interestingly enough, Plaintiffs then argue that "If Doms' assertions with respect to the findings are correct, he is not entitled to rescission, but rather a remand for entry of sufficient findings." *(See* Plaintiff's Op. Br. p. 13). However, Plaintiffs have utterly failed to present any specific facts upon which the additional findings of prejudice by the trial court are grounded. How can the trial court make additional findings where no evidence exists to support them? Doms suggests Plaintiffs have had their chance in this second appeal, but if no facts exist to support the findings, the Court should merely remand and order rescission.[1]

In this Court's opinion in 920653CA, this Court held: "If the trial court cannot find from the evidence presented that the Appellants were prejudiced by the delay, the equitable

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[1] *See* Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618 (Utah 1989) ("Remand is not necessary if evidence in record is undisputed and appellate court can fairly and properly resolve case on record before it."); *see also*, Kearns Tribune Corp. v. Hornak, 917 P.2d 79 (Utah App. 1996).

doctrine of laches should not bar the remedy of rescission. Accordingly, we remand this case to the trial court." (emphasis added).[2] This is the ruling that Doms is asking this Court to now make based upon the fact that no facts or evidence have been presented to this Court (and indeed do not exist) to support the alleged new findings of prejudice made by the lower court in paragraphs 10 (a) through 10 (h) in the lower court's Supplemental Findings of Fact. *See* Doms Op. Br., Add. 2, pp. 4-6.

Plaintiffs also argue that rescission was not available to Doms because he did not own and, therefore, could not tender the subject property. Again, this Court has decided this issue in its Memorandum Opinion in Case No. 920653CA when it clearly held "We agree with the trial court's decision to allow Doms to proceed with his Counterclaim and find Appellants' arguments to be without merit." (*See* Doms Op. Br., Add. 1, p. 2) (R. 8553-8567). Plaintiffs' argument should be summarily rejected by this Court.

Despite the supplemental findings involving prejudice made by the lower court upon remand, the court also made a second set of Findings of Fact and Conclusions of Law upon remand in its Order on Court's Minute Entry of May 6, 1997, attached as Addendum 3 to Doms' opening brief (R. 8512-8517). The Conclusions of Law in issue on the point regarding Doms' ownership of the property were:

> 1. Despite intervening conveyances between Doms and McCoy to Domcoy, the foreclosure upon title to the Rossi Hills property by Summit County, and the subsequent reconveyance to Doms by Summit County, Doms presently holds clear title to the property and his right to pursue his Counterclaim is not effected.
>
> 2. Plaintiffs lack standing to attack the validity of the warranty deed conveying Rossi Hills from Domcoy to Doms which is a valid deed vesting title to the

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[2] *(See* Doms Op. Br., Add. 1 at p. 3). The Court should note that the Appellants in that prior appeal were Plaintiffs. Doms is Appellant and Cross-Appellee in this appeal.

property in Doms.

3. Doms is prosecuting his Second Amended Counterclaim as the real party in interest, because Rossi Hills was never partnership property.

Therefore, the trial judge simply embodied this Court's decision in Case No. 920653CA in these Conclusions of Law.

Plaintiffs argue that "the Court's Supplemental Findings demonstrate that the (sic) Doms had no basis for rescission." (*See* Plaintiffs' Op. Br. at p. 16). This Court has already decided that Doms was entitled to rescission if the trial court could find prejudice; thus Plaintiffs' argument in this regard should be summarily dismissed by this Court. Although this Court did note in its opinion in Case No. 920653CA that " [I]n the event the trial court does not rescind the transaction, the trial court should note that its findings and conclusions do not adequately treat the effect of the intervening conveyances to and from Domcoy on Doms' right to pursue his counterclaims and the effect of the default judgment entered against McCoy and the sheriff's sale of McCoy's interest in Rossi Hills on Doms' ownership interest in the property and any damages for breach of title warranties," the trial judge found all of these issues in favor of Doms. *See* Doms Op. Br. Add 3., Findings of Fact 1-12, pp. 3-8 (R. 8513-8515).

The Court then concluded as a matter of law (as indicated previously): "Despite intervening conveyances between Doms and McCoy to Domcoy, the foreclosure upon title to the Rossie Hills property by Summit County, and the subsequent conveyance to Doms by Summit County, Doms presently holds clear title to the property and his right to pursue his counterclaim is not effected." *See* Doms Op. Br. Add. 3, Conclusion of Law No. 1, p. 5 (R. 8515).

Relating to the issue of "the effect of the default judgment entered against McCoy and

the sheriff's sale of McCoy's interest in Rossi Hills on Doms' ownership interest in the property," the Court found as follows:

> 9. A sheriff's sale occurred on December 12, 1988, by the Sheriff of Summit County and a corrected sheriff's deed bears the date of June 26, 1989, transferring the interests of defendant McCoy in the Rossi Hills property to plaintiffs.
>
> 10. At the time of the issuance of the sheriff's deed, defendant McCoy had no ownership interest whatsoever in the Rossi Hills property.

See Doms Op. Br., Add. 3, Findings of Fact 9, 10, p. 4 (R. 8515).

In addition, the Court concluded as a matter of law:

> 4. The Default Judgment entered against McCoy and the sheriff's sale of McCoy's interest in Rossi Hills has no effect on Doms' ownership interest in the property and his ability to collect damages for breach of title warranties, because McCoy had no ownership interest in Rossi Hills when the sheriff's sale pursuant to the Default Judgment against McCoy was conducted; and plaintiffs, therefore, acquired no ownership interest in the property from the sheriff's sale.

See Doms Op. Br., Add. 3, Conclusion of Law No. 4 at p. 5 (R. 8516).

Finally, this Court indicated that the trial judge needed to further deal with the issue of "any damages for breach of title warranties." The Court did in fact deal with that issue as follows:

> 11. Doms and McCoy did not purchase the property as a partnership, and at no time did either party hold the property as a partnership.
>
> 12. Plaintiffs have not sued Doms and McCoy in this lawsuit as a partnership, and have never obtained or attempted to obtain a Judgment against Doms and McCoy as a partnership.

See Doms Op. Br., Add. 3, Findings of Fact Nos. 11 and 12 at pp. 4, 5 (R. 8515, 8516).

Despite the foregoing Findings and Conclusions by the trial judge, Plaintiffs continue to raise the argument that Doms knew of the encroachments on the property and, therefore, rescission is not available to him. Although the lower court found that Doms was aware of

the encroachments, the court did not find anywhere in its Findings or Conclusions that Doms understood the nature of the legal encumbrance on this subject property.

Doms cited to the court below the case of Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990), which is controlling and should determine the outcome of the instant case. In Breuer-Harrison, like the instant case, the buyers walked the subject property with the sellers' real estate agent prior to their purchase. 799 P.2d at 719. The sellers' agent, (like Plaintiffs' agent, Sloan, in regard to the encroachments on Rossi Hills in the instant case), was aware of what he termed a "water line" prior to the sale of the property, "but considered it only a minor impediment to the development of the property for housing units." Id. at 724. The buyers did not learn that this water line was an easement and constituted a legal encumbrance on the subject property until some five years after their purchase. Id. Although the buyers talked with the sellers approximately one year later about rescinding the contract as an option, the buyers did not seek rescission until some four years after they learned of the pipeline easement. Id. at 722, 726.

In the instant case, Doms immediately sought rescission after obtaining knowledge, through his diligent efforts and those of Kinghorn, that there were legal encumbrances on Rossi Hills.[3] In Breuer-Harrison, this Court affirmed the summary judgment of the trial court granting rescission to the buyers and rejecting the sellers' laches claim, because the buyers were diligent in ascertaining the complete impact of the pipeline easement. Id. at 726-27. The holding and reasoning of this Court in Breuer-Harrison are *a fortiori* applicable to the instant case and preclude application of laches against Doms.[4]

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[3] *See* R. 7500, 7504-05, 7611, 7625.

[4] The Utah Supreme Court has recently held that when one panel of the Court of Appeals is faced with a prior decision of a different panel, the doctrine of *stare decisis*

In light of the fact that this Court has specifically concluded in Case No. 920653CA that the remedy of rescission is available to Doms if the Court finds prejudice in the case, the Court should simply reject this argument made by Plaintiffs.

Plaintiffs also argue in their responsive brief that somehow Doms had two theories with regard to his assertion of rescission. This is absolutely false! Doms has consistently alleged the singular position that rescission should be available to him because covenants against encumbrances contained in the warranty deed had been violated; and all of the Court's Findings of Fact and Conclusions of Law on this subject support that conclusion.[5]

Therefore, Plaintiffs' argument in this regard is without merit and should be summarily rejected by this Court since the law of the case indicates that Doms should be entitled to rescission as a matter of law, unless the record evidence showed a prejudice to Plaintiffs.

Plaintiffs also argue that "Doms' failure to properly request rescission waived his right to rescission." Again this Court has already determined that rescission is an appropriate remedy if prejudice to Plaintiffs cannot be found, despite the three years after the purchase when Doms finally obtained knowledge of the encumbrances and made his request for rescission from Plaintiffs. (R. 7507-08). Again, the case of Breuer-Harrison v. Combe, *supra*, is controlling. Despite the allegations of Plaintiffs in their brief to the contrary, in Breuer-Harrison, this Court upheld the trial court's summary judgment of rescission as the

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has equal application, although the doctrine is typically thought of as applying to a single-panel appellate court. State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993). Thus, Doms' right to rescission and rejection of Plaintiffs' laches claim in the instant case should be considered a matter of *stare decisis*.

[5] *See* Doms Op. Br. Add. 5, Findings of Fact Nos. 6 through 15 (R. 6878, 6879); Conclusions of Law Nos. 1 through 5 (R. 6889, 6890); Second Amended Judgment Nos. 3 and 4 (R. 6902).

appropriate remedy for the Plaintiffs, even though the Plaintiffs did not assert their right of rescission for five years after they learned of an irremediable pipeline easement. 799 P.2d at 726, 727. Again, this argument by Plaintiffs should be summarily rejected by this Court.

Finally, after 20 pages of their opening brief, Plaintiffs get to the true issue in this case as to whether or not the trial court properly found Plaintiffs were prejudiced by Doms' delay. In his opening brief, Doms argued that the Court's Findings of Fact regarding prejudice in its Supplemental Findings of Fact and Conclusions of Law as per the Memorandum Decision of the Court of Appeals dated May 31, 1996, were not supported by any evidence in the record and, therefore, constituted an abuse of discretion by the Court. Doms first argued that paragraph 10 (a) was conclusory, insufficiently detailed, and lacked evidentiary support. The only response to this argument set out by Plaintiffs in their opening brief on pages 23 and 24 is that "Doms had the benefit of the property to exclusion of Plaintiffs during this six-year period between the time of the purchase and the time of the tender of rescission offer." Plaintiffs then cite the case of Taylor v. Moore, 51 P.2d 222 (Utah 1935) as somehow supporting this Finding of Fact. It is significant that Plaintiffs do not cite any portion of the record which supports this Finding of Fact; and, therefore, the Court may conclude, as claimed by Doms in his opening brief, that there is no record evidence to support this Finding of Fact. Furthermore, Plaintiffs' allegation that there was a "six-year period between the time of the purchase and the time of the tender of the rescission offer" directly contradicts Plaintiffs' previous statement on page 18 of their opening brief that "Doms has admitted that his rescission request was not filed for at least three years after the purchase."

In fact, the uncontradicted evidence in the record is that the property was purchased in March of 1982 (R. 6877); and Doms' tender of rescission occurred in January of 1985 (R.

7504-07). Furthermore, although the 1935 case of Taylor v. Moore does in fact suggest that a party is not allowed to "go on deriving all possible benefits from the transaction, and then claim to be relieved of his own obligations by seeking its rescission," Doms in this case did not derive any benefits from this transaction since the Court found that the encumbrances existed from the day the transaction took place.[6]

Furthermore, no evidence exists on the record that Doms "benefited" in any way from the transaction at the expense of the Plaintiffs since there was no development efforts whatsoever made upon the property by Doms.

As with Finding 10(a), the Court should note that Findings 10(b), 10(c), 10(d), and 10(e) contain no references whatsoever to the record with regard to any evidence presented in the lower court to support these findings. In fact, Plaintiffs make a completely disingenuous and false argument when they state that Plaintiffs were somehow required to move to clear title to the property and, therefore, had to file Case No. 10066 (a companion case joined with the instant case), to clear title to the property. What makes this statement completely false and misleading is that, although the property was sold at tax sale based upon Domcoy's failure to pay property taxes, Domcoy purchased the property back from Summit County on August 24, 1988; and Domcoy by Warranty Deed dated August 26, 1988, conveyed Rossi Hills back to Doms. (Doms Op. Br., Add. 19 and 20) (R. 3117, 3160-61). Therefore, Doms was then fully possessed of the property in fee simple. *See* Doms Op. Br., Add. 3, Conclusion of Law No. 1 (R. 8515).

Despite this fact, and in their stubbornly litigious fashion, Plaintiffs filed a Complaint

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[6] "5. The aforesaid statutory covenants contained in the warranty deed were breached upon the delivery of the warranty deed to Doms on March 23, 1982." *See* Doms Op. Br., Add. 5, Conclusion of Law No. 17 (R. 6891).

in Civil No. 10066 on December 19, 1988, almost four months after Doms had repurchased the property from Summit County. Their Complaint in Case No. 10066 (joined with lower court Case No. 8339 and, therefore, by implication joined on appeal in the instant matter) alleged that Summit County had improperly sold the property at tax sale since they had failed to notify Plaintiffs, as trust deed holders, that a sale was taking place. This was so, despite the fact that Doms had already repurchased the property and Plaintiffs could not have possibly been damaged by this tax sale. The parties ultimately stipulated, and the Court concluded, that the tax sale was unconstitutional and illegal and set it aside. However, in light of the fact that Doms was at that time in possession of the property, having repurchased it almost four months prior to the time Civil No. 10066 was ever filed by Plaintiffs, the issue was completely and entirely moot; although the lower court awarded some attorney's fees to Plaintiffs for having filed this frivolous lawsuit. *See* Doms Op. Br. pp. 34-36.

In responding to Doms' argument regarding paragraph 10(c), Plaintiffs argue prejudice existed because one of the four sellers of the property, D.C. Anderson, had died; and therefore, his version of the transaction was no longer available. However, there is no citation whatsoever to the record showing a proffer to the lower court as to what his testimony would have been with regard to his version of the transaction. Furthermore, there is no suggestion in the record whatsoever, or even in Plaintiffs' opening brief, that the deceased's version of the transaction would in any way have affected the case one way or the other. In fact, the record in this case reflects that neither Plaintiffs Ellen Anderson, Dan Scott, or Jeanne Scott, the other three living Plaintiffs, testified at trial as to their version of the events. Plaintiffs did call their agent, Mike Sloan, who testified as to certain events which occurred surrounding the transaction, but none of the Plaintiffs themselves

testified. Therefore, again, we find that the argument that Plaintiffs were prejudiced by the death of D.C. Anderson, one of the Plaintiffs, is disingenuous at best, and is simply not supported by the record. Therefore, this fact cannot constitute prejudice to Plaintiffs.

With regard to Finding 10(d), Plaintiffs claim they were prejudiced by the fact that Doms did nothing in an effort to clear the encroachments and easements. However, as found by the trial court, the encroachments had been on the property "in excess of 40 years" causing the Court to conclude as a matter of law that "said encumbrances existed on the Rossi Hills property on the date of the delivery of the deed, which was March 23, 1982."[7] Furthermore, the Court also concluded as a matter of law, unchallenged by Plaintiffs at any point on appeal, that "Under Utah law, it was the Plaintiffs' burden and obligation to mitigate the damages suffered by Doms because Plaintiffs were in breach of the statutory covenants contained in the deed at the time the deed was delivered."[8] The inappropriateness of Plaintiffs' argument on this point can further be seen by Plaintiffs statement that "legal actions by the Plaintiffs to clear the encroachments and easements should they be forced to reacquire the property through rescission would now be virtually impossible."[9] This argument is disingenuous at best and false and misleading at worst. This is because the encroachments had met the 20-year requirement under Utah law at the time Plaintiffs transferred the property to Doms as found by the trial court; thus it was Plaintiffs' obligation, not the grantee, Doms', obligation to clear the property of these encroachments,

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[7] *See* Doms Op. Br., Add. 5, Second Amended Findings of Fact No. 9; Second Amended Conclusion of Law No. 3 (R. 6878, 6889).

[8] *See* Add. 5 to Doms' Op. Br.; Second Amended Conclusion of Law No. 17 (R. 6891).

[9] Plaintiffs Op. Br. pp. 23, 24.

since Plaintiffs were statutorily guaranteeing to the grantee that there were no encumbrances or encroachments which would burden the property. The possibility that, if Plaintiffs now receive the property back they will be unable to clear the encroachments and easements, places them in no better or worse position then they were in when they transferred the property to Doms on March 23, 1982. *See* Doms Op. Br., Add. 5, Conclusion of Law Nos. 3, 4, and 5 (R. 6889, 6890).

Finally with regard to Finding 10(e), this Court rejected the idea that prejudice exists merely from a decrease in the value of property in its opinion in Case No. 920653CA.[10]

Furthermore, the exact same argument of a plummeting real estate market and substantially decreased real estate values was made by the sellers in the Breuer-Harrison case, *supra*, and was categorically rejected by this Court. 799 P.2d at 726-27.

Since Finding of Fact 10(f) simply restates Finding 10(e), the same arguments apply. Furthermore, Plaintiffs make no response to Doms' argument in his opening brief that Findings of Fact 10(g) and 10(h) are Conclusions of Law and cannot possibly be seen as findings of fact supported by evidence from the record, which therefore supports prejudice to Plaintiffs in allowing the doctrine of laches to prevent rescission in this case. Therefore, these two findings should be ignored by this Court.

POINT II

DOMS IS ENTITLED TO HIS ATTORNEY'S FEES AND COSTS, AND THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES AND

[10] The Court ruled in a footnote "We note that we do not agree that anytime property increases or decreases in value, the prejudice prong of the laches defense is automatically met. (Citing cases) . . . a change in property value is one factor the Court should consider in determining prejudice (citing cases). Further, other courts have determined that a change in property value did not prejudice landowners because the change could be taken into account by a court of equity in fashioning a just remedy. (citing cases)." *See* Doms Op. Br., Add. 1, Memorandum Decision 920653CA, n. 1.

COSTS TO PLAINTIFFS.

Although Plaintiffs attempt to argue that Doms did not claim attorney's fees for having to defend his "title" to the property, and that was because his "title" was not attacked, this statement by Plaintiffs is again false and disingenuous at best. This can be see in Point I of Plaintiffs' opening brief in this matter, where Plaintiffs continue to make the argument that Doms had somehow lost title of his property because he and McCoy had transferred the property to the company Domcoy Inc., which had subsequently transferred it back to Doms; an argument previously rejected both by the trial court and this Court in the first appeal.[11]

Plaintiffs also inappropriately argue "Had the tax sale (in Case No. 10066) not been set aside, the Plaintiffs' trust deed would have been extinguished by operation of law. This made Civil No. 10066 necessary."[12] Again, this argument is false and disingenuous at best, in light of the fact that, although the property had been sold by Summit County at a tax sale, Domcoy repurchased the property on August 24, 1988, and received a Quit-Claim Deed from Summit County conveying it back; and on August 26, 1988, Domcoy conveyed Rossi Hills by warranty deed to Doms (*See* Doms Op. Br., Add 19 and Add. 20). Again, it should be noted that Civil No. 10066 was not filed by Plaintiffs until December 19, 1988, almost four months after Doms had received valid title to the Rossi Hills property. (*See* R. 2-66, Supp. Record of Case No. 10066).

It is significant that no case law whatsoever is cited by Plaintiffs suggesting that "had the tax sale not been set aside, the Plaintiff's trust deed would have been extinguished by

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[11] *See* Doms Op. Br., Add. 3, Findings of Fact. 1-8, Conclusions of Law 1-3 (R. 8513-8516); Doms Op. Br., Add. 1, p. 2.

[12] *See* Plaintiffs Op. Br. p. 26.

operation of law." The Court is asked to reject and ignore this unsupported assertion and to find that the tax sale was merely an indication of the stubbornly litigious manner in which Plaintiffs pursued this lawsuit. In addition to filing this completely separate action, Plaintiffs also filed an interlocutory appeal with the Supreme Court when the lower court ruled that Plaintiff Jeanne Scott be joined as involuntary Plaintiff; and then would not accept the decision of the Supreme Court and later filed a petition for injunctive relief with the Supreme Court. The Supreme Court denied each of these efforts by Plaintiffs; and yet, preempting the prerogative of the Supreme Court, the lower court awarded some attorney's fees to Plaintiffs for having brought these actions. *See* Doms Op. Br. pp. 36, 37.

Furthermore, Plaintiffs respond to Doms' argument that Judge Frederick ordered sanctions against Doms for failing to respond to discovery without allowing the hearing required under Rule 37(a)(4), U.R.C.P. by claiming that a hearing on December 31, 1991, was "devoted to an evidentiary hearing regarding attorney's fees." This argument is false and misleading! The truth is that the hearing of December 31, 1991, was held specifically for the purpose of determining the <u>amount</u> of attorney's fees, and the Court refused to become involved in this issue as to whether or not the attorney's fees were appropriate under Rule 37(a)(4) despite the request by Doms' counsel that the Court do so. (*See* R. 6360-6540). The Court will note in reviewing the record of that proceeding that at no time is Doms given an opportunity to explain to the Court why he objected to and refused to answer certain discovery requests. Furthermore, Doms has never been given an opportunity to explain to Judge Rokich, as the trial judge in that amount hearing, that Judge Frederick had partially ruled in favor of Doms and against Plaintiffs, and yet awarded attorney's fees against Doms. Furthermore, Doms was not allowed to explain that Judge Frederick was in error in awarding attorney's fees against him for filing an additional motion for the required

hearing under Rule 37(a)(4) which was summarily denied by Judge Frederick with an award of additional attorney's fees (R. 1968; *see* Doms Op. Br. Add. 28).

Therefore, the arguments made by Doms in his opening brief on pages 38 through 41 are appropriate and the Court is asked to review them again.

It is also important to note that in his opening brief, Doms claims that he is entitled to a refund of a substantial amount of the attorney's fees and costs paid to Plaintiffs as a condition of the trial court setting aside the default judgment; and no mention whatsoever of that issue, let alone a rebuttal to it, is provided by Plaintiffs in their responsive brief.

POINT III

PLAINTIFFS' ARGUMENTS ON CROSS-APPEAL SHOULD BE SUMMARILY DISMISSED BY THIS COURT.

In their arguments on cross-appeal, Plaintiffs continue to ask the Court to revisit issues that the Court has already decided in Doms' favor in its Memorandum Opinion in Case No. 920653CA. Point IV of Plaintiffs' opening brief argues that Doms is not entitled to an award of damages against Plaintiffs because he only owned an undivided one-half interest subject to the trust deed. On remand, the trial court found in its "Order on Court's Minute Entry of May 6, 1997," that Doms was properly possessed of the property in question, despite transfers to a corporation and retransfers to Doms, and that Doms possessed the property in fee simple at the present time. The Court concluded as a matter of law that "despite intervening conveyances between Doms and McCoy to Domcoy, the foreclosure upon title to the Rossi Hills property by Summit County, and the subsequent reconveyance to Doms by Summit County, Doms presently holds clear title to the property and his right to pursue his Counterclaim is not affected."[13] Furthermore, the lower court

[13] *See* Doms Op. Br., Add. 3, Conclusion of Law No. 1 (R. 8515).

found that "Plaintiffs lack standing to attack the validity of the Warranty Deed conveying Rossi Hills from Domcoy to Doms which is a valid deed vesting title to the property in Doms."[14] The Court also concluded as a matter of law, after finding the appropriate facts, that "the default judgment entered against McCoy and the sheriff's sale of McCoy's interest in Rossi Hills has no affect on Doms' ownership interest in the property and his ability to collect damages for breach of title warranties, because McCoy had no ownership in Rossi Hills when the sheriff's sale pursuant to the default judgment against McCoy was conducted; and Plaintiffs, therefore, acquired no ownership interest in the property from the sheriff's sale."[15] Since Doms has clearly been held to own 100% of the property, it is respectfully requested that this argument by Plaintiffs be summarily dismissed by the Court.

Plaintiffs also argue in Point V of their brief that Doms was precluded from a trial on damages for breach of warranty. However, this argument seems to be based upon an election of remedies argument which has been rejected by the trial judge and by this Court as well.

Under Utah law, a party has not been required to "elect remedies" as erroneously claimed by Plaintiffs since at least the adoption of the Utah Rules of Civil Procedure on January 1, 1950. Rule 8(a)(2) provides that a party may demand judgment for the relief to which he is entitled, and that "[r]elief in the alternative or of several different types may be demanded." Rule 8(e)(2) further provides that "[a] party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."

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[14] *See* Doms Op. Br., Add. 3, Conclusion of Law No. 2 (R. 8516).

[15] *See* Doms Op. Br., Add. 3, Conclusion of Law No. 4 (R. 8516).

Furthermore, Rule 18(a) provides that a party "may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." Finally, Rule 54(c)(1) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The argument now advanced by Plaintiffs in Point V of their opening brief was rejected by the Utah Supreme Court 36 years ago in Smoot v. Lund, 369 P.2d 933 (Utah 1962). In Smoot, the Court held that a party is not required to elect which remedy he wishes to proceed on during the trial of the case. The Court cited Rules 18(a) and 8(e)(2), U.R.C.P., and held that "[t]hey show a clear purpose to eliminate rigidity of rules and technical objections as to the form or nomenclature for claims for relief." 369 P.2d at 935. *See also* Rosander v. Larsen, 376 P.2d 146 (Utah 1962).

Therefore, this Court should summarily reject this argument as the trial court did and as this Court apparently did in its Memorandum Opinion in Case No. 920653CA.

The arguments in Point VI and Point VII in Plaintiffs' brief alleging that Anderson and Scott are entitled to the benefit provided in the contract, and that set-off was not available to Doms clearly are not applicable, and are merely duplicative of arguments regarding the alleged necessity for the tax sale case, Case No. 10066, and Doms' knowledge of the existence of the encumbrances at the time of the purchase of the property.

Finally, Plaintiffs once again raise the statute of limitations issue which was denied by the lower court and was clearly denied by this Court in its Memorandum Opinion in Case No. 920653CA. This Court specifically noted that one of Plaintiffs' claims alleging that Doms was not entitled to proceed with the Counterclaim was "whether the statute of limitations barred the counterclaim." The Court went on to rule "We agree with the trial

court's decision to allow Doms to proceed with his Counterclaim and find Appellants' arguments to be without merit. Thus, we decline to address them." Again, this now becomes the law of the case and this argument should again be summarily rejected by this Court.

POINT IV

THE TRIAL COURT ERRED BY RULING THE WARRANTY DEED, TRUST DEED AND TRUST DEED NOTE DO NOT CONSTITUTE A SINGLE CONTRACT OR TRANSACTION, AND BY REFUSING TO RULE THAT DOMS WAS EXCUSED FROM PERFORMANCE AND NOT IN DEFAULT UNDER THE TRUST DEED AND TRUST DEED NOTE.

Plaintiffs argue in their brief on cross-appeal that this Court, if it finds that Doms is not entitled to rescission, should then reverse and remand and uphold the final judgment of the trial court, with the modifications they suggest in their brief. It apparently is Plaintiff's belief that the mere fact that Doms might lose on the issue of rescission should essentially end the case; however, as Doms argued in his briefs in Case No. 920653CA, if rescission is not allowed, this Court should reverse the trial court and find that it erred by ruling the warranty deed, trust deed, and trust deed note do not constitute a single contract or transaction; and by refusing to rule that Doms was excused from performance and not in default under the trust deed and trust deed note.[16]

A. The warranty deed, trust deed and trust deed note constitute a single contract or transaction and must be construed together in determining the rights and obligations of the parties.

The warranty deed conveying Rossi Hills to Doms and McCoy was executed by Plaintiffs in consideration for the execution of the trust deed and trust deed note by Doms and McCoy. These three documents, all bearing the same date of March 10, 1982,

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[16] *See* Doms Op. Br. Add 5, Second Amended Conclusions of Law Nos. 6, 7, 8, and 9 (R. 6890).

constitute a single contract or transaction evidencing the sale of Rossi Hills.

Pursuant to Utah statutes and case law, a trust deed or mortgage must include a deed of conveyance such as a warranty deed.[17] Furthermore, the Utah Supreme Court has definitively ruled that the legal debt or obligation secured by a trust deed or mortgage is part of and inseparable from the trust deed or mortgage: "As a matter of law, in order to establish a valid trust deed or mortgage, a legal debt or obligation with a specific amount owing must exist." Bangerter v. Poulton, 663 P.2d 100, 101 (Utah 1983) (emphasis added). In accord General Glass Corp. v. Mast Construction Co., 766 P.2d 429, 432 (Utah App. 1988), cert. denied, 109 Utah Adv. Rep. (Utah 1989). The interest of a mortgagee under a mortgage or a beneficiary under a trust deed is "a mere lien, incapable of being separated from the debt and transferred by itself." State Bank of Lehi v. Woolsey, 565 P.2d 413, 415 (Utah 1977)(emphasis added); Belnap v. Blain, 575 P.2d 696, 698 (Utah 1978).

The unquestioned law in Utah is that a note and mortgage (which includes the warranty deed) constitute a single contract. In First Savings Bank of Ogden v. Brown, 54 P.2d 237, 240-41 (Utah 1936), the Utah Supreme Court held as follows: "The note and mortgage, given at the same time, and as parts of the same transaction, must be construed together as constituting one contract. They supplement each other and express the entire contract between the parties." (emphasis added).[18]

The fact that a warranty deed, trust deed and trust deed note are deemed to constitute a single contract under clear Utah law simply follows the general rule of law in

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[17] See U.C.A. §§ 57-1-12, 57-1-14, 57-1-19 (Add. 23); W.M. Barnes Co. v. Sohio Nat. Res. Co., 627 P.2d 56, 59 (Utah 1981); Bown v. Loveland, 678 P.2d 292, 297 (Utah 1984).

[18] See also Brown v. Skeen, 58 P.2d 24, 32-33 (Utah 1936); Bybee v. Stuart, 189 P.2d 118, 122-23 (Utah 1948); Kjar v. Brimley, 497 P.2d 23, 25-26 (Utah 1972).

Utah and throughout the country that contemporaneously executed instruments regarding the same subject matter or transaction must be construed together as a single contract. This basic principal of law is clearly set forth by the Utah Supreme Court in Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972):

> [W]here two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together as far as determining the respective rights and interests of the parties, although they do not in terms refer to each other.

501 P.2d at 271 (footnote omitted and emphasis added).[19]

The fact that the warranty deed must be considered to be part of a single contract or transaction along with the other documents of transfer is further emphasized by all of the Utah rescission cases cited in this brief, and especially Breuer-Harrison v. Combe, *supra*. In each of these cases, the entire transaction was rescinded, not just the warranty deed.

The trial court adopted the erroneous and completely unsubstantiated argument advanced by Plaintiffs that the Rossi Hills transaction should be split into separate contracts involving the "sale" evidenced by the warranty deed as one contract; and the "financing" evidenced by the trust deed and trust deed note as another contract. The trial court erroneously applied the doctrine of merger, which has nothing to do with this issue, to somehow reach its conclusion splitting the transaction into separate contracts. Therefore, Conclusions of Law 6, 7, 8 and 9, *supra* footnote 16, represent clear errors of law by the trial court and must be reversed.

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[19] In accord First Security Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1080 (Utah 1983); Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987); Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1358-59 (Utah App. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 202(2).

B. Plaintiffs were in breach of contract when they delivered the warranty deed conveying Rossi Hills with encumbrances and title defects.

The trial court correctly ruled in Conclusion of Law 5 (R. 6890) that the statutory covenants contained in the warranty deed pursuant to U.C.A. § 57-1-12 were breached by Plaintiffs upon delivery of the warranty deed on March 23, 1982.[20]

C. Doms was excused from all performance regarding the Rossi Hills transaction, and therefore was never in default under the trust deed and trust deed note.

In Bergstrom v. Moore, supra, the Utah Supreme Court held as follows: "If it plainly appears that a seller has lost or encumbered his ownership so that he will not be able to fulfill his contract, he cannot insist that a buyer continue to make payments." 677 P.2d at 1125 (citations omitted and emphasis added). In other words, the buyer is excused from performance under the contract because he is not considered under the law to be in default.

In regard to the law of contracts in general, clear Utah case law and the general rule of law throughout the country holds that where one party to a contract has failed or refused to perform an obligation under it, the non-breaching party is excused from performance under the contract, and may recover all money already paid and other losses incurred by him. Sprague v. Boyles Bros. Drilling Co., 294 P.2d 689, 693 (Utah 1956).[21] The RESTATEMENT OF CONTRACTS § 274(1), cited by the Utah Supreme Court in Sprague, frames the issue in terms of a failure of consideration by the breaching party which

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[20] Bergstom v. Moore, 677 P.2d 1123, 1125 (Utah 1984); Soderberg v. Holt, 46 P.2d 428, 431 (Utah 1935).

[21] Sprague cites the following authority in support of this proposition: Anvil Mining Co. v. Humble, 153 U.S. 540 (1894); 5 WILLISTON ON CONTRACTS § 1303 (rev. ed.); RESTATEMENT OF CONTRACTS § 274(1). See also 17A Am. Jur. 2d Contracts §§ 621, 664, 701; 17A C.J.S. Contracts § 452; Sjoberg v. Kravik, 759 P.2d 966, 969 (Mont. 1988); Sharbono v. Darden, 715 P.2d 433, 435 (Mont. 1986); O'Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc., 595 P.2d 679, 684-85 (Colo. 1979).

discharges the non-breaching party from his duties under the contract. Comment (a) to § 274 explains that in any such case, the non-breaching party is excused from performance and may reclaim what he has given, or its value. The Utah Supreme Court has consistently held that failure of consideration is a complete defense to any claim of the breaching party based upon the contract, and that the non-breaching party is excused from performance and not in default under the contract.[22]

D. If rescission is denied, the judgment of the trial court should be reversed and remanded with directions to enter judgment in accordance with the law as set forth above.

Second Amended Conclusions of Law 6-9 (R. 6890), 20-32 (R. 6891-6894), and 51-54 (R. 6898); and paragraphs 1 (R. 6901), 5-12 (R. 6903-6905), and 19-22 (R. 6906) of the Judgment; all constitute errors of law by the trial court which must be reversed under the legal correctness standard of review. These errors of law are in regard to the trial court's rulings splitting the Rossi Hills transaction into separate contracts; holding Doms in default under the trust deed and trust deed note; foreclosing on Doms' interest in Rossi Hills in a "hybrid" procedure involving mortgages and/or trust deeds; awarding Plaintiffs amounts due under the trust deed and trust deed note plus interest; and awarding Plaintiffs attorney's fees and costs based upon Doms' alleged default under the trust deed and trust deed note.

If rescission is denied, on remand the trial court should be directed to enter a judgment consistent with the principals of law set forth in subpoints A through D above. The judgment should be that Doms must pay the purchase price of the property, with a set-

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[22] See Assets Realization Co. v. Cardon, 272 P. 204, 207 (Utah 1928); General Ins. Co. of Am. v. Carnicero Dynasty Corp., 545 P.2d 502, 504 (Utah 1976); Bentley v. Potter, 694 P.2d 617, 619 (Utah 1984) (quoting 6 S. WILLISTON, THE LAW OF CONTRACTS § 814, at 17-78 (3d ed. 1962)); Copper State Leasing v. Blacker Appliance, 770 P.2d 88, 91 (Utah 1988).

off for all amounts received by Plaintiffs toward the purchase of the property and for any damages suffered by Doms as a result of Plaintiffs' breach of contract.

Doms owes Plaintiffs nothing under the trust deed and trust deed note, and is entitled to the following amounts as set-offs against the $276,750.00 purchase price of Rossi Hills:

1. $82,500.00, which represents the earnest money payment of $10,000.00 and the down payment of $72,500.00 (*See* Doms Op. Br., Add. 5, Findings of Fact No. 18 (R. 6879)).

2. $72,520.25, which represents the sum total of all monthly payments received by Plaintiffs under the trust deed note (Id. Findings of Fact No. 22 (R. 6880)). Since Doms was excused from performance under the trust deed note, no interest ever accrued and all such monthly payments were principal payments and represent additional set-offs against the purchase price of the property (Id. Findings of Fact No. 21 (R. 6880)).

3. The amount of damages suffered by Doms as a result of the encumbrances existing on Rossi Hills, the trial court concluded, was $83,000.00 (Id. Conclusion of Law No. 19 (R. 6891)). However, Doms submits that the trial court abused its discretion in this award, and the damages suffered by Doms as a result of the encumbrances should be $166,050.00. (R. 7863-64; Ex. 88D pp. 38-39, 55, 75; 7848-49, 7866, 7870, 8208-09).[23]

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[23] An expert real estate appraiser, Jerry R. Webber, compiled an extensive appraisal report totaling 112 pages (including 37 pages of addenda), in which Webber appraised the fair market value of Rossi Hills in March of 1982 both with and without the encumbrances found by the trial court to exist on Rossi Hills (Ex. 88D). Webber calculated that the fair market value of Rossi Hills in March of 1982 without considering any encumbrances of any kind on the property was $276,750.00, which corresponds exactly to the purchase price actually paid for the property. This calculation was based on a maximum of ten residential units (five duplexes) which could be built on the property, with a valuation of $27,675.00 per unit (R. 7863-64; Ex. 88D, p. 55). Applying the correct law as set forth by the trial court in Conclusions of Law 13-15, the damages suffered by Doms as a result of the encumbrances on Rossi Hills in March of 1982 should be $166,050.00, which represents the difference in the fair market value of the property without any encumbrances ($276,750.00) minus the value of the property with the encumbrances ($110,700.00). It is apparent that the trial court arbitrarily cut the

4. Prejudgment interest under U.C.A. § 15-1-1 should be awarded to Doms at the rate of 10% per annum, on all amounts received by Plaintiffs pursuant to the Rossi Hills transaction from the date each such payment was received to the entry of judgment by the trial court on remand. Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977), cert. denied, 431 U.S. 930 (1977); Fell v. Union Pacific Railway Co., 88 P. 1003, 1006-07 (Utah 1907).

5. Prejudgment interest on the amount of damages ultimately awarded to Doms should also be awarded from March 23, 1982, the date the warranty deed was delivered, to the final entry of judgment by the trial court on remand. Bjork, supra; Fell, supra.[24]

6. All attorney's fees and costs should be awarded to Doms, plus prejudgment interest on the award of attorney's fees (*See* Doms Op. Br., Point II).

CONCLUSION

The trial court's Findings of Fact on remand regarding alleged prejudice suffered by Plaintiffs through Doms' delay in seeking rescission are not supported by the evidence in the record. Because the trial court was unable to enter additional Findings of Fact concerning prejudice which are supported by the record, Doms is entitled to rescission.

Furthermore, if this Court should deny Doms the remedy of rescission, it should find

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amount of damages found by Webber as a result of the encumbrances on the property in half, and ruled that Doms had suffered $83,000.00 in damages rather than $166,050.00 (C. of L. 19; Judgment, ¶ 4). The judgment of the trial court was arbitrary and constitutes an abuse of discretion because it is manifestly unjust and was unduly influenced by evidence which should have been completely disregarded by the trial court. Maybey v. Kay Peterson Const. Co., 682 P.2d 287 (Utah 1984).

[24] See also Uintah Pipeline Corp. v. White Superior Co., 546 P.2d 885 (Utah 1976); Gillespie v. Blood, 17 P.2d 822 (Utah 1932); St. Joseph Stock Yards Co. v. Love, 196 P. 305 (Utah 1921); Wheatley v. Oregon Short Line R. Co., 162 P. 86 (Utah 1916); Railroad v. Board of Education, 99 P. 263 (Utah 1909); East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280 (Utah 1925).

that the warranty deed, trust deed, and trust deed note were all one single transaction, and that that contract was breached by Plaintiffs when they violated the statutory warranties against encumbrances. Doms should thus be excused from performance on the trust deed note, and the trust deed should be invalidated by the Court. Finally, Doms should be entitled to recover all sums paid and be awarded all damages proven at trial in this matter; with attorney's fees being awarded to him as the prevailing party in this case.

DATED this 17th day of September, 1998.

LARRY R. KELLER
Attorney for Defendant/Appellant
and Cross-Appellee Eugene E. Doms

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing was mailed, by first class postage prepaid, on this 17th day of September, 1998, to:

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